APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Submitted: August 9, 1982
Filed: August 13, 1982

Before *Heaney* and *McMillian*, Circuit Judges, and *Henley*, Senior Circuit Judge.

HEANEY, Circuit Judge.

William Clark appeals from the district court's April 24, 1981, order dismissing, pursuant to Fed. R. Civ. P. 12(b)(6), his lawsuit for damages under the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (TILA).[1] *Clark*

[1] Clark also asserted several pendent state law claims which the district court dismissed pursuant to Fed. R. Civ. P. 12(b)(1) after dismissing his Truth in Lending Act claims. *Clark v. Rent-It Corporation*, 511 F. Supp. 796, 799 (S.D. Ia. 1981).

v. Rent-It Corporation, 511 F. Supp. 796 (S.D. Ia. 1981). Because we conclude that the district court erred in dismissing Clark's suit solely on the pleadings before any evidence was presented, we reverse its judgment and remand for further proceedings.

In November, 1979, and again in February, 1980, Clark entered into contracts with Rent-It Corporation to "rent" a television set for seventeen dollars per week. In both instances, the parties executed standard form contracts that were supplied by Rent-It and that provided at the top in bold face type: "**THIS IS A RENTAL AGREEMENT WITH OPTION TO PURCHASE.**" Under the agreements, Clark was entitled to become the owner of the television if he paid the weekly fee for seventy-eight consecutive weeks. The sole issue presented here is whether the "Rental Agreement with Option to Purchase" executed by Clark and Rent-It constituted a "credit sale" under the TILA within the meaning of 15 U.S.C. § 602(g).[2] If the "Rental Agreement with Option to Purchase" constituted a "credit sale" under the TILA, Rent-It was required by 15 U.S.C. § 1638 to make certain disclosures to Clark. If, on the other hand, the agreement was not such a "credit sale," the TILA was not applicable, and Clark's complaint would not state a claim for relief under the federal statutory scheme. Clark has

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[2] 15 U.S.C. § 1602(g) provides:

> The term "credit sale" refers to any sale in which the seller is a creditor. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contracts.

filed an appellate brief in this Court, but Rent-It has not despite repeated requests by our Clerk's office.

The case authority on the issue presented here is limited to a few decisions by district courts, which have split on the question.[3] The court below rejected the decisions holding that agreements like the one involved here were, or might be shown to be, "credit sales" because they "gloss[ed] over the limited obligation of the lessee." *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798. It reasoned that because the "Rental Agreement with Option to Purchase" specifically obligated Clark to "rent" the television for "only one

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[3] The decisions which have held that agreements similar to the one involved in this case are *not* "credit sales" covered by the TILA include: *Lemay v. Stroman's, Inc.*, 510 F. Supp. 921 (E.D. Ark. 1981); *Dodson v. Remco Enterprises, Inc.*, 504 F. Supp. 540 (E.D. Va. 1980); *Stewart v. Remco Enterprises, Inc.*, 487 F. Supp. 361 (D. Neb. 1980); *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (E.D. La. 1978), *aff'd*, 618 F.2d 397 (5th Cir. 1980) (brief per curiam opinion without analysis); and, apparently, several other unpublished district court decisions which have not been presented to this Court.

In contrast, the United States District Court for the District of Maryland held, in denying a defendant's motion to dismiss, that a "Rental Agreement With Option to Purchase" much like the agreement involved in this case did constitute a "credit sale" under the TILA. *Waldron v. Best T.V. and Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979). In addition, Clark appended three unpublished district court opinions in his brief in this Court which concluded that similar agreements might well constitute "credit sales" under the TILA. Therefore, those courts denied various defendants' pretrial motions to dismiss or for summary judgment. *Burks v. Curtis Mathes Centers, Inc.*, No. 4-79-429 (D. Minn., Nov. 14, 1980); *Jones v. Action TV Rentals, Inc.*, No. 79-1535 (E.D. Pa., June 30, 1980); *Johnson v. McNamara*, No. H-78-238 (D. Conn., April 13, 1979).

week,"[4] his obligations as a "weekly lessee" were much less than those of a purchase under a conditional sales contract. Moreover, it rejected Clark's contention that under Iowa Code § 554.1201(37), the "Rental Agreement with Option to Purchase," was a security instrument, that is a conditional sales contract, rather than a true lease.[5] Finally, it concluded that discovery and

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[4] The relevant provisions of the "Rental Agreement with Option to Purchase" provide:

> TITLE AND OPTION: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for 78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall, at the end of 78 weeks, be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.
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> TERMINATION BY RENTER: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Renter is *required* to rent this equipment for only one week.

Clark v. Rent-It Corporation, supra, 511 F. Supp. at 797 (emphasis in original).

[5] The Uniform Commercial Code (UCC), codified in Iowa Code § 554.1201(37), provides in part:

> Whether a lease is intended as security is to be determined by the facts of each case; however, * * * an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

[footnote continued]

further proceedings were not necessary prior to adjudication of the issue. *Id.* at 798–799. Accordingly, it held that as a matter of law, the agreement between Clark and Rent-It did not constitute a "credit sale" as defined in 15 U.S.C. § 1602(g). It stated: "[a] lease giving an option to acquire title is a disguised 'credit sale' * * * only if the lessee is *obligated* to pay rent in an aggregate sum equal to or in excess of the value of the rented property." *Id.* at 799 (emphasis included). Clark filed a timely notice of appeal.

Clark essentially argues in this Court that: (1) the district court erred in denying him an opportunity to offer evidence that would prove facts entitling him to relief under the TILA; and (2) the district court's analysis of the "Rental Agreement with Option to Purchase," the TILA, and the relevant case authority was unduly restrictive. We agree with both contentions.

Preliminarily, we are mindful of the general legal principles applicable to this case. The district court "is

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Some courts have held that under this provision of the UCC, "leases" which give the "lessee" both an option to terminate at will and an option to purchase at the end of the "lease" period are conditional sales contracts rather than rental agreements. *See, e.g., Waldron v. Best T.V. and Stereo Rentals, Inc., supra,* 485 F. Supp. at 819–820. *See also* White and Summers, Uniform Commercial Code (2d ed. 1980), §§ 22-3, 22-4, at 880–888. The district court here, however, concluded that Iowa Code § 554.1201(37) did not aid Clark because he "could not become the owner of the TV set 'upon compliance with the terms of the lease.'" *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798. That observation ignores the fact that Clark *could,* and was indeed *entitled* to become the owner of the television set if he complied with the terms of the "Rental Agreement with Option to Purchase"—that is, if he paid the seventeen dollars weekly "rental" fee for seventy-eight consecutive weeks. *See* slip op., *supra,* at n.4. The district court on remand should reconsider the applicability of Iowa Code § 554.1201(37) in this case.

constrained by a stringent standard in passing on a Rule 12(b)(6) motion to dismiss." *Fusco v. Xerox Corp.*, No. 81-2133 (8th Cir., April 28, 1982), slip op. at 3. This Court in *Fusco* explained:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the [face] of the complaint that there is some insuperable bar to relief [citations omitted]." *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Id.

The TILA "is remedial in nature, and the substance rather than the form of credit transactions should be examined in cases arising under it." *Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1976). Moreover, in interpreting agreements possibly covered by the TILA, "the practices of the trade, the course of dealing of the parties, and the intention of the parties in addition to specific contractual obligations" must be considered. *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 90 (8th Cir. 1976). The legislative history of the TILA shows that Congress was aware that "some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress

attempted to establish," *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973), and that it intended to include within the statutory definition of "credit sales" purported leases "if they are, in essence, disguised sale arrangements." 1968 U.S. Code Cong. & Ad. News 1962, 1980.

In light of the foregoing legal principles, we hold that the district court committed reversible error by dismissing plaintiff's complaint. Moreover, we disagree with the district court's observation that evidence reflecting that Rent-It "enters into numerous similar transactions and that most customers keep [their] TV set[s] for 78 weeks and exercise the option to become its owner" is "irrelevant." *Clark v. Rent-It Corporation, supra,* 511 F. Supp. at 798-799. Such evidence is clearly relevant to Clark's explanation of the totality of the circumstances surrounding his transactions with Rent-It, and the parties' contractual expectations. *See* the decisions in note 3, paragraph 2, slip op., *supra,* at 3.

Clark argues that if given the opportunity he would attempt to show that: (1) when he signed the contracts with Rent-It, he was led to believe, and did in fact believe, that he was purchasing the television set; (2) Rent-It's business is aimed at low income customers who cannot obtain loans and who cannot afford to pay cash but who desire to purchase television sets; and (3) Rent-It entered into numerous transactions in which the "lessee" of its property eventually became owners of such property. Clark should be given an opportunity to substantiate these claims, and to establish that the "Rental Agreement with Option to Purchase" was in fact a disguised credit sale.

Accordingly, the district court's April 24, 1981, order is reversed and the case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CIVIL DIVISION

Civ. No. 80-516-B

William Clark,
Plaintiff,

v.

The Rent-It Corporation,
Defendant.

April 24, 1981

Susan B. Brammer, Des Moines, Iowa, for plaintiff.
Michael Hyzer, Des Moines, Iowa, for defendant.

VIETOR, District Judge.

Plaintiff sues under the Truth-in-Lending Act, 15 U.S.C. § 1601 et seq., to recover statutory damages for defendant's failure to comply with the disclosure requirements of the Act. Plaintiff also asserts state pendent claims under the Iowa Consumer Credit Code, Iowa Code § 537.1101 et seq. Defendant has moved to dismiss the federal claim for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and the pendent state claims for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1).

The complaint alleges the following: On October 13, 1979, plaintiff and defendant entered into a written agreement under which plaintiff rented a television set from defendant for a rental charge of $17 per week. The pertinent portions of the agreement provide:

> TITLE AND OPTION: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for 78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall, at the end of 78 weeks, be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.
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> TERMINATION BY RENTER: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Render is *required* to rent this equipment for only one week.

Plaintiff rented the TV set until January 24, 1980, when defendant repossessed it. On February 1, 1980, the parties re-established their arrangement by re-delivery of the TV set to plaintiff and execution of a new agreement identical to the original. On August 5, 1980, defendant again repossessed the TV set.[1] Plaintiff's efforts to

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[1] Plaintiff does not allege defendant's reason for either repossession, but the agreement provides for termination of the agreement by defendant in the event of nonpayment of rent or other breach by plaintiff.

get defendant to return the TV set were unsuccessful. Defendant considered the agreement terminated.

Plaintiff contends that the agreement is really a sales agreement disguised as a lease agreement and that the transaction is a "credit sale" within the meaning of 15 U.S.C. § 1602(g), which provides:

> The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

If the transaction is a "credit sale" defendant was required by 15 U.S.C. § 1638 to make certain disclosures to the plaintiff. If the transaction is not a "credit sale," plaintiff has failed to state a claim for relief under the Truth-in-Lending Act.

Case authority on the issue is limited to a few district court opinions, most of them unpublished. In *Stewart v. Remco Enterprises, Inc.*, 487 F. Supp. 361 (D. Neb. 1980), Judge Denney sustained defendant's motion for summary judgment in a similar action holding that the agreement did not fall within the meaning of the term "credit sale" as defined in section 1602(g) because the plaintiff was *required* to pay only one week's rent, a sum less than the value of the TV set. *See Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127, 129 (E.D. La. 1978). *Contra, Waldron v. Best T.V. & Stereo Rentals, Inc.*, 485 F. Supp. 718 (D. Md. 1979).

Unpublished district court opinions provided to the court by plaintiff's counsel and citations in *Stewart v. Remco Enterprises, Inc., supra,* 487 F. Supp. at 363, and *Waldron v. Best T.V. & Stereo Rentals, Inc., supra,* 485 F. Supp. at 719 n.2, of other unpublished district court opinions reveal that the courts that have confronted the issue have split rather evenly.

Plaintiff relies on *Waldron v. Best T.V. & Stereo Rentals, Inc., supra,* and unpublished decisions reaching the same result as *Waldron,* which take the view that an agreement like that involved in this case is in substance a conditional sale contract. I do not find this view persuasive because it glosses over the limited obligation of the lessee. Under these agreements the lessee is obligated to rent the chattel for only one week. He is not obligated to rent it for such a length of time that the total rental payments will equal or exceed the value of the rented chattel. On the other hand, a purchaser under a conditional sale contract, although he pays by weekly or monthly installments and is subject to forfeiture of the chattel if he defaults, is obligated to pay the *full* purchase price and is therefore obligated, in the event of default and forfeiture, to pay any deficiency remaining after repossession and resale of the chattel. Furthermore, the seller may choose to invoke other remedies. *See* Part V of Article 9, Uniform Commercial Code—Secured Transactions, Ch. 554 of the Code of Iowa. The difference between the commitments of the weekly lessee and the conditional sale purchaser is substantial.

Plaintiff, correctly pointing out the guidance to be received on this issue from the commercial law of the state which governs the contract, cites the following definition language in the Uniform Commercial Code, Iowa Code § 554.1201(37):

> Whether a lease is intended as security is to be determined by the facts of each case; however, * * * an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

I find no support for plaintiff's position in this statutory definition because plaintiff could not become the owner of the TV set "upon compliance with the terms of the lease." He complied with the terms of the lease when he paid $17 rental for one week's possession of the TV set, but he could not become its owner unless he elected to keep renting it for each of the succeeding 77 weeks.

Plaintiff suggests that discovery is necessary before the issue presented can be adjudicated and therefore adjudication cannot be made on a motion to dismiss. He predicts that discovery would show that defendant enters into numerous similar transactions and that most customers keep the TV set for 78 weeks and exercise the option to become its owner.[2] If such evidence were discovered, it would be irrelevant. What most customers choose to do would not affect plaintiff's contractual obligation to do no more than rent the TV set for one week at $17. The issue presented is a legal one, not a factual one, and is properly determinable as a matter of law in response to defendant's motion to dismiss.

It is this court's conclusion that the agreement between plaintiff and defendant does not constitute a "credit

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[2] Such anticipated facts would be substantially different from the facts in *Smith v. ABC Rental Systems of New Orleans, Inc.*, 491 F. Supp. 127 (E.D. La. 1978), cited in the body of this ruling. In *Smith* defendant's manager testified that 73% of defendant's customers kept their TV sets less than four months and that most of these kept their set one month or less. *Id.* at 128.

sale" as defined in section 1602(g). A lease giving an option to acquire title is a disguised "credit sale" within the meaning of the statute only if the lessee is *obligated* to pay rent in an aggregate sum equal to or in excess of the value of the rented property.

Defendant's motion to dismiss must be sustained as to plaintiff's federal claim, Count I of the complaint, and because the federal claim is being dismissed it is appropriate to also dismiss the pendent state claims, Counts II and III. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966).

Defendant's motion to dismiss is sustained and the clerk is directed to enter judgment in favor of the defendant and dismiss plaintiff's complaint.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1982

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

September 15, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM, 1982

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In accordance with the Court's directions, appellee's motion to recall mandate and stay mandate pending certiorari proceedings is denied.

October 12, 1982

APPENDIX E

THE RENT-IT CORP.
2211 Hickman Rd., Suite 1A
Des Moines, Iowa 50310

Renter	Clark, William & Delores		
Residence Address	2413 Bennet Des Moines, Ia. 50310		
Phone	np		
Item	C.C.	Brand	GE
Model	YM9408WD	Serial	5R4A12434
Inventory Stock #	240268		

Rental rate per week (includes state and local taxes if applicable) $17.00

In home pick-up charge $10.00

Processing fee none

Commencement date of rental term Friday, 2-1-80

THIS IS A RENTAL AGREEMENT WITH OPTION TO PURCHASE

The undersigned, herein called "renter", whether one or more, do jointly and severally hereby rent from the rental company, herein called "owner", the above described personal property, herein called "property", at the rental rate set forth above, payable weekly in advance for a week to week term beginning on the commencement date stated above.

THIS IS A WEEK-TO-WEEK RENTAL AGREEMENT WITH AN OPTION TO PURCHASE

Title and Option: Title remains at all times in the owner during the time which this rental option agreement is in effect. If renter chooses to rent this equipment for

78 consecutive (in a row) weeks at the weekly rental charge shown above, and fulfills all other terms and conditions of this agreement, title to the equipment shall at the end of 78 weeks be transferred to renter in the form of a paid receipt. The renter receives use and possession of the property for successive one week terms so long as weekly rental payments are made on or before the date due and renter complies fully with all agreements and conditions hereof and unless this agreement is terminated as provided herein.

Processing Fee: In addition to the other amounts set forth herein, a one time charge of (none) is payable along with and in addition to the first rental payment. This fee is charged for the processing and preparation of the rental order and customer file.

In Home Pick-up Charge: This agreement does *not* bear interest and there is *no* default or late charge. *However,* if the renter wishes to rent the equipment described above for more than one week, the payment for the second week is due on the same day of the following week and likewise as to each additional week the renter wishes to rent the equipment. If the renter does not make his payment when due and the owner sends an employee to the place where the equipment is located to pick up the equipment at that time and/or collect the money due, *then and only then* shall the owner be entitled to receive $10.00 for making the trip to the customer's home or other place where the equipment is located. This charge is shown above as an in home pick-up charge.

Termination by Renter: Renter at its option may at any time terminate this agreement by return of the property to owner in its present condition fair wear and tear excepted and by payment of all rental payments due on or during the week of termination. Renter is *required* to rent this equipment for only one week.

Termination by Owner: This agreement shall at the option of the owner and without notice terminate upon the failure of renter to make every rental payment required herein on the date due or by breach by the renter of any agreement, condition or representation, all of which are agreed to be material. On termination renter shall immediately return the property to owner in its present condition, fair wear and tear excepted, and renter shall remain liable for all payments hereunder to the date of termination and for the performance of all agreements and conditions hereof.

Location of Property: Renter warrants and agrees that it will keep said property in its possession at the residence address above and will not remove said property from said address without agreement in writing executed by the owner. If renter moves said property without securing prior agreement in writing from owner, this agreement shall be thereby breached, giving the owner the right of immediate possession and renter shall be liable for prosecution under applicable state laws.

Damages: Renter is fully responsible for the loss, theft or destruction of said property from all causes whatever and agrees to pay to the owner the fair market value of the property in such event. In the event of damage and/or partial destruction from any cause whatever, renter agrees to pay to the owner a reasonable cost of repair to said property.

Assignment: This agreement may be sold, transferred and assigned by owner without restriction. Renter has no right to assign, sublease or transfer his rights herein without the written consent of owner.

Maintenance: The owner does hereby agree to maintain the personal property in good working order and any and all maintenance or repairs to the property of

the owner rented hereunder must be performed by the owner and the owner will not be responsible for costs of any repairs done at the request of the renter by others.

Owner's Right to Enter and Take Possession: The owner and its agents upon the termination of this agreement are specifically authorized to peaceably enter upon any premises where the property may be found and renter agrees to allow owner to take possession of and remove the property without liability, and owner and its agents are hereby released and discharged from any claim or cause of action in or relating to entry and taking possession in accordance with this agreement and renter agrees to indemnify owner and its agents for all costs, expenses and damages occurring directly or indirectly from or related to the taking possession and the removal of said property.

Renter has no right to sell, mortgage, pawn, pledge, encumber or dispose of said property or to move said property from the residence address listed above. To do so is a breach of this agreement and renter shall be liable under applicable state law.

TIME IS OF THE ESSENCE OF THIS AGREEMENT.

This rental agreement may be modified, varied, altered, or extended, or the agreements or conditions hereof waived, only by agreement in writing executed by the owner. Renter acknowledges receipt of said property in satisfactory operating condition.

I HAVE READ AND UNDERSTOOD THE ABOVE RENTAL AGREEMENT AND A COMPLETED COPY OF THIS AGREEMENT HAS BEEN DELIVERED TO ME.

Renter /s/ William Clark

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1558

William Clark,
Appellant,

v.

The Rent-It Corporation,
Appellee.

PETITION FOR REHEARING

COMES NOW the Appellee and moves this Court pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure for a rehearing of its judgment filed August 13, 1982 in the above stated matter.

It is unfortunate that the Appellee, the Rent-It Corporation (Rent-It), did not pursue the defense of this appeal by appearance of counsel or brief. Counsel filing this petition for rehearing has been engaged by the trade association representing the rapidly developing "Rent-To-Own" industry, with the concurrence of counsel for Rent-It in the District Court.

Counsel is mindful of the fact that Rule 40 of the Federal Rules of Appellate Procedure was not promulgated as a crutch for dilatory parties and that in the absence of demonstrable mistake the same matters that could have been addressed by responsive brief should not

be reargued by motion for rehearing. *U.S. v. Doe*, 455 F.2d 753 (1st Cir. 1972).

Mindful of these admonitions and the need not to abuse this privilege, counsel has reviewed the pleadings filed by the parties in the District Court, the District Court's order and this Court's opinion reversing the order of the District Court. That review has revealed what counsel believes to be a misapprehension of the nature of the commercial relationship between these parties and an oversight in the application of the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (TILA), to that relationship.

This petition was prepared to point out to the Court these oversights and misapprehensions that, when reconsidered, will show the Court that a different result should apply.

The first area of the Court's opinion that requires reexamination is its analysis of the nature of the lease agreement between Clark and Rent-It and the consequences of that document to both parties.

While this Court criticized the District Court for its ". . . unduly restrictive . . ." analysis of the rental agreement, it has, by its ruling, glossed over the rather extensive "bundle of rights" that Clark was vested with in his agreement with Rent-It. This "bundle of rights" simply and rather straightforwardly removes this arrangement from the application of the TILA.

The agreement in question gave Clark a full range of enforceable options in his dealings with Rent-It. The most notable of these was the provision for terminating the contract. As pointed out by the District Court in its opinion: "[Clark] at [*his*] option [could] *at any time* terminate this agreement by return of the property to

[Rent-It] in its present condition fair wear and tear excepted." (Emphasis added.) Under the clear and unambiguous terms of that portion of his agreement, Clark could end his relationship with Rent-It by simply returning the goods and thereby having no further obligation to Rent-It. This was an unrestricted right. It could occur after 1, 2, 3 or any number of weeks. It could occur regardless of any unwritten expectations on the part of Rent-It as to the possible duration of its lease with Clark.

Further, Clark had an absolute right to demand that Rent-It maintain this property in proper working order at no additional cost to Clark.

Clark had an absolute right to exercise his option to renew for successive rental periods if he so chose. However, this was an option and, as pointed out above, he also had the unilateral right to reject that option, at any time, with no further obligations.

These rights are brought to the Court's attention because, by its order, this Court apparently has overlooked the fact that Clark was under no legally compellable obligation to renew his lease for any additional terms. No facts that may be discovered in the lower court can alter this. No factual scenario that Clark deems significant in this case has any impact on this absolute and unfettered right to stop renting this property at any time he chose.

But why is this oversight of such proportion that this Court should reconsider its opinion in this matter? Because in a lease agreement such as this where the rental fee for the *obligated* term is not ". . . substantially equivalent to or in excess of the aggregate value of the property . . . involved . . ." and the renter is under *no*

obligation to renew for any successive term or terms then the TILA does not apply. 15 U.S.C. § 1602(g).

Rent-It will not deny that the TILA has application to some leases. What this Court has overlooked is the difference between the type of lease covered by the TILA and the lease signed by Mr. Clark.

The TILA wisely provides for application to leases that are, in fact, credit sales dressed up to look like leases. However, it does not apply to all leases or even to all leases where a renter may ultimately receive title to the property.

The type of lease covered by the TILA has the following characteristics consistent with the definition of "credit sale" in 15 U.S.C. § 1602(g):

1. The total rental paid during the term is a sum substantially equivalent to or in excess of the aggregate value of the property rented.

2. During the term of the lease, i.e. the period during which the sum referred to above will be paid, the renter has no right to cancel without further obligation.

3. At the end of the term the renter, for no other or nominal consideration, becomes the owner of the property.

If a lease does not contain all of these characteristics then it cannot be covered by the TILA. Without all three characteristics a lease arrangement simply does not fit within the Act's definition of covered leases. To overlook this is not to *interpret* the law but rather to *rewrite* it.

The lease agreement that Mr. Clark signed did not contain the restriction listed above prohibiting cancella-

tion of his obligation until the full sum is paid. In fact, as pointed out, it specifically provided that he could so cancel. Mr. Clark's lease could not then be a TILA-covered rental arrangement.

Discovery will not change that fact. Mr. Clark's factual queries will not modify his right nor change the law as written.

This Court was correct in pointing out in its opinion that Congress "intended to include within the statutory definition of 'credit sales' purported leases if they are, in essence, disguised sale arrangements." However, the Court apparently overlooked the fact that the type of lease arrangement dealt with by the TILA is that described above and not that signed by Mr. Clark. The above cited statement of Congressional intent was made manifest in the TILA in a form Congress thought appropriate and that statement should not be used to encourage this or any other court to ignore the clear and unambiguous wording of the statute. Congress told the courts the parameters of the type of leases that should be scrutinized and covered by the TILA, and it would be improper for this Court to seize on the legislative equivalent of *obiter dictum* to ignore the statute as finally written.

Further, the Court has apparently overlooked an entire body of law in the area in the form of the Federal Reserve Board Staff Opinions that uniformly conclude that such lease transactions are not "credit sales" subject to the TILA. *See* Federal Reserve Board Staff Opinions No. 2701, July 31, 1973; No. 750, January 11, 1974; No. 761, March 12, 1974; No. 783, April 18, 1974, 5 CCH, CCG ¶ 31,105; No. 871, February 28, 1975, 5 CCH, CCG ¶ 31,202; No. 1010, February 25, 1976, 5 CCH, CCG ¶ 31,350; No. 1192, June 15, 1977, 5 CCH,

CCG ¶ 31,623; and No. 1259, October 20, 1977. Staff Opinions Nos. 750, 1192 and 1259 are particularly applicable to the consumer lease. The Fed Staff has concluded time and again that a short-term rental agreement with a continuing option to cancel by the consumer is not a "credit sale" because there is no contractual obligation on the consumer's part to pay "a sum substantially equivalent to or in excess" of the value of the leased property. The following excerpt clearly illustrates the point.

> A reading of the * * * program indicates that the lease with the option to purchase offered does not fall within the definition of a credit sale, because it does not meet the first requirement as set out in § 226.2(n) [renumbered 226.2(t)]: We note that the * * * lease agreement may be cancelled at any time, given 30 days prior notice, at no cost or penalty to the customer. In point of fact, item 3 of the agreement provides: "The term of this contract shall be for one month, beginning on the day of installation. Thereafter, this contract will automatically renew itself monthly for successive terms of one month each up to a maximum of thirty six (36) months . . . ." Therefore, a lessee under the plan would not have contracted "to pay as compensation for the use of a sum substantially equivalent to or in excess of the aggregate value of the property or services provided." Since the * * * program does not meet this criteria in the definition of credit sale, there is no need to determine whether its option price may be categorized as "nominal consideration."

(Excerpts from Federal Reserve Board Staff Opinion No. 750, January 11, 1974.)

This excerpt is repeated nearly word-for-word in Op. No. 1192, a more recent Fed staff opinion on the point (June

of 1977). Another strong staff statement is found in Op. No. 761.

The Supreme Court, in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 567, 568, clearly articulated the weight to be given the opinions of the staff of the Federal Reserve Board. The stated reason for this consideration and deference to the agency charged by Congress with promulgating the regulations under the TILA was because it is in line with ". . . language in the legislative history evinc[ing] a decided preference for resolving interpretive issues by uniform administrative decisions, rather than piecemeal through litigation." *Milhollin*, 444 U.S. at 568. This Court has apparently overlooked this significant directive from the Supreme Court that has particular application to the instant matter.

This Court's opinion should be reconsidered for yet another reason. In citing those cases dealing with "interpreting agreements" and seeking to ascertain the "parties' contractual expectations" this Court has overlooked some of the basic elements of contract law.

Initially, the subjective expectations of these parties, or the parties to any written contract, are irrelevant unless their writing is deemed to be ambiguous. Further, that issue is one of law and not of fact. Facts become relevant only when a court has decided, as a matter of law, that the contract or some portion of the contract is ambiguous. That is not the case here. The terms of Mr. Clark's agreement with Rent-It are clear, and simple, and do not suggest any ambiguity requiring a factual inquiry to determine the intent of the parties. It is true that the lynchpin of contractual interpretation is ascertaining the intent of the parties. But the court must first look to the words used by the parties and from

them seek to ascertain their intent. It is only when that intention cannot be so determined that the law allows the court to inquire factually. The impact of ignoring this well established body of law should not be overlooked by this Court.

Finally, the relief afforded Mr. Clark by this Court is the procedural equivalent of a "fishing license." There are no apparent limits on what discovery Mr. Clark may engage in. Relevance is no guide because this Court appears to be expanding the limits of relevancy here to infinite proportions. The potential for Rent-It to be victimized in the discovery process, pursuant to this Court's opinion, is awesome. The only limit will apparently be the ingenuity of Mr. Clark's lawyer. In this day of abusive discovery practices it is incredible to counsel for Rent-It that this Court could have misapprehended the consequences inherent in the nature of its ruling. The broad, sweeping, and unfettered discovery indicated in the last paragraph of this Court's opinion provides no clearly defined limits by which the District Court may circumscribe the discovery called for in the opinion.

Furthermore, in the event of a trial, what limitation will there be on evidence presented given the parameters set out by this Court? When Mr. Clark's lawyer asks him what he believed when he signed this clear, simply written, and unambiguous agreement that he either read or could have read, large bodies of the laws of evidence and contracts, as we know them today, will be totally ignored.

These then are the matters of law and fact that appear to be fundamental to this case yet have been overlooked or misapprehended by this Court. Counsel for Rent-It, however, is mindful that courts are aided greatly in not overlooking or misapprehending such issues when both

parties to appellate litigation thoroughly brief and argue the issues prior to the court ruling. Counsel regrets that the Court was not afforded this assistance in a more timely fashion but the importance of this ruling and its impact as precedent in the many areas mentioned above certainly dictate a rehearing on these critical yet misapprehended issues of fact and law.

Respectfully submitted,

/s/ J. Samuel Choate, Jr.

Of counsel:

Surrett, Choate & Walker
Suite 1000
230 Peachtree Street
Atlanta, Georgia 30303
(404) 681-3301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 1982, a copy of the foregoing Petition for Rehearing, was sent by first class mail, postage prepaid to:

Susan Barnes Brammer
Attorney at Law
102 East Grand Avenue
Des Moines, Iowa 50309

/s/ J. Samuel Choate, Jr.